

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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DEC - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
)

1998 Biennial Regulatory Review --)
Streamlining of Radio Technical Rules in)
Parts 73 and 74 of the Commission's Rules)
)

MM Docket No. 98-93

REPLY COMMENTS OF DELMARVA BROADCASTING COMPANY

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December 4, 1998

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To the Commission:

REPLY COMMENTS OF DELMARVA BROADCASTING COMPANY

Delmarva Broadcasting Company ("Delmarva"), pursuant to Section 1.415 of the Commission's Rules, hereby submits these Reply Comments in response to comments filed in the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding. ^{1/} In the *Notice*, the Commission proposed rules that would enable FM radio broadcast stations to cause or accept interference to other FM stations in a manner consistent with the public interest. In general, the comments filed support this proposal. *See, e.g.*, Comments of Mullaney Engineering, Inc. at 5-6. However, a few commenters, such as the National Association of Broadcasters ("NAB"), have claimed that the Commission would be

^{1/} *Notice of Proposed Rule Making, In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, MM Docket No. 98-93 (released June 15, 1998) ("Notice"). Delmarva is the licensee of 9 radio stations in Delaware and Maryland, including WDEL(AM), Wilmington, Delaware; WSTW(FM), Wilmington, Delaware; WXCY(FM), Harve de Grace, Maryland; WICO(AM), Salisbury, Maryland; WICO-FM, Salisbury, Maryland; WQJZ(FM) (formerly WLFX), Ocean Pines, Maryland; WAFL(FM), Milford, Delaware; WYUS(AM), Milford, Delaware; and WXJN(FM), Lewes, DE.

abandoning its responsibility to protect the integrity of the FM band were it to adopt the proposal. *See* NAB Comments at 13-20.

Delmarva disagrees. The Commission's responsibility is to facilitate the use of broadcast spectrum that best benefits the public. Hard-and-fast rules that limit the use of spectrum also limit the ability of licensees to respond to their publics' interests. Hard-and-fast rules that intend to preclude interference but that limit licensees based on something other than actual interference -- such as the distance separating stations -- are especially unlikely to make the most efficient use of the broadcast spectrum.

In contrast, a Commission rule that enables licensees to negotiate interference agreements among themselves offers additional opportunities for licensees to expand their services or to limit interference to new services. A Commission rule, as the one proposed, that increases the freedom available to licensees to expand or improve their services subject to certain specific requirements and Commission review also is unlikely to endanger the integrity of the spectrum. In fact, as Cumulus Media Inc. (among others) noted, the ability to agree to certain short-spacings is necessary if radio is to have the flexibility necessary to best serve their listeners. In order to expedite efficient use of scarce radio spectrum, the Commission should adopt the proposal to allow parties to negotiate private interference agreements that may continue for any term chosen by the parties as long as the agreements satisfy a limited set of specific public criteria.

I. A RULE ENABLING NEGOTIATED INTERFERENCE AGREEMENTS IS CONSISTENT WITH THE COMMISSION'S ROLE AS THE FACILITATOR OF BETTER BROADCAST SERVICE.

The Commission's primary responsibility is not, as NAB suggests, to select a single set of "interference standards" to apply uniformly to every radio station in the United States. *See* NAB Comments at 9-10. Rather, the Commission is charged to advance the public interest through regulation of the broadcast spectrum. *See, e.g., Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840 (1997). In certain instances, the public interest is best served by inflexible national standards. In most cases, however, the public interest would be better served by provisions that enable local broadcasters to assess their individual circumstances and to propose expanded uses of the broadcast spectrum in a manner that would best serve their local audiences. Such a regulatory focus on determining what works best in any particular case reflects the nature of radio itself: a fundamentally local service that demands attention to the peculiar circumstances of the area it serves in order to prosper.

In the *Notice*, the Commission proposed a change in its Rules regulating predicted interference among broadcast stations. This change is not radical. The Commission already has established rules to enable other stations to upgrade despite predictions of increased interference. *See, e.g., Notice* at ¶¶ 6-10. As the Commission implies in the *Notice*, the proposed rule simply corrects the

existing policy of providing less interference flexibility to fully-spaced stations than stations which already are short-spaced. *Id.* at ¶ 10.

Nor is the Commission abandoning its role as the selector of “interference standards.” The proposal in the *Notice* does not suggest that any station can agree to accept or to cause any type of projected interference. Instead, the proposal strictly defines the circumstances in which parties can negotiate interference agreements, limiting such agreements to cases in which the proposed interference meets four narrow criteria. ^{2/} These restrictions on acceptable negotiated agreements demonstrate that the Commission does not intend to abandon its role as the regulator of interference, but simply wishes to involve broadcast licensees in determining what types of interference should be permissible in specific cases. ^{3/}

The proposal also does not risk the “integrity” of FM broadcast service. In general, the Commission’s restrictions on what types of negotiated interference agreements will be accepted ensure that the FM band is not likely to be materially

^{2/} See *Notice* at ¶ 20. These criteria include: 1) limiting total predicted interference experienced by any station to one-twentieth of its protected service area and population; 2) requiring that total service must be five times as great as the increase in total predicted interference, in both area and population; 3) prohibiting predicted interference within the boundaries of any affected station’s community of license; and 4) requiring new interference areas to be served by at least five aural services.

^{3/} These criteria, which necessarily limit application of the proposed rule, also should quell concerns that the change would spark a widespread transformation in the ways FM receivers are constructed, as NAB hypothesizes. NAB Comments at 15-17.

and adversely affected by the proposed rule change. ^{4/} Even in specific cases, however, the nature of the proposed change limits any danger to FM broadcasting. The proposed rule enables FM broadcast licensees to better protect their own interests and to respond to their own markets. If a struggling station believes it is more likely to survive as a result of an interference agreement, it can negotiate such an agreement. But if a station believes that interference will cause it to lose listeners (and revenues) or slow its transition to new technologies, then the station will not spend the money necessary to arrange interference agreements and to complete the concomitant technical changes to the station.

In sum, the Commission is entirely within its purview in proposing to allow certain negotiated interference agreements. Although the Commission may need to oversee negotiated arrangements involving broadcast licenses, this supervision does not require the *ex ante* prohibition of such arrangements that NAB advocates. As past proceedings have made clear, the role of the Commission is not to prohibit all creative or novel approaches to spectrum use. Rather, the Commission's role is to encourage private parties to use commercial broadcast spectrum in means advancing the public interest. It is altogether reasonable that the Commission should want to create means by which several private parties might negotiate to improve radio service to a particular locality.

^{4/} Accordingly, it is inappropriate for the Commission to reject its own proposal based on the slippery-slope logic of NAB, which implies that any capability to negotiate interference agreements by individual FM licensees is tantamount to the elimination of most or all interference restrictions. See NAB Comments at 10-11.

II. A RULE ENABLING NEGOTIATED INTERFERENCE AGREEMENTS ALSO WOULD ADVANCE THE COMMISSION'S PRIMARY PURPOSE: TO ENSURE THAT USE OF THE BROADCAST SPECTRUM SERVES THE PUBLIC.

The proposed change not only would pose little risk to the overall health of the FM band, but also is likely to increase the ability of FM stations to maintain or improve their service. *See Notice* at ¶ 27. As Cumulus notes in its comments, the proposed rule is well-timed: with the onset of digital television construction, radio stations are increasingly forced to locate new transmitter sites, which may result in occasions where interference agreements offer the best means to locate another feasible site. ^{5/}

More important, however, the proposed rule would enable stations for which the spacing requirements are overly restrictive to expand their services. In many such cases, the resulting "predicted" interference may not even result in any significant actual interference as a result of the inconsistencies between predicted and actual interference contours. *See, e.g.,* Comments of Mullaney Engineering, Inc. at 5. Even in cases in which some actual interference might result, the advantages of acceptable interference agreements far outweigh any potential disadvantages. Notably, under the Commission's proposal, five times as

^{5/} *See* Cumulus Comments at 4-5. Nor should the Commission worry that accumulated interference agreements would make it harder for parties to change sites in the future, as it would be in the negotiating stations' interests to specify caveats in any agreement to protect themselves against any forced re-location. Otherwise, it is doubtful that such interference agreements will be so widespread as to block many other stations in the market from necessary technical changes.

many persons as would be predicted to experience interference would be required to receive new broadcast service for a negotiated agreement to be approved.

Of course, in order to ensure that any such proposal would not disrupt existing radio service in a particular area, the Commission should require a party to a negotiated interference agreement to file that agreement along with any related application for a construction permit. *See, e.g.*, Comments of Hatfield & Dawson Consulting Engineers, LLC at 9. To the extent that parties object to the agreement or the related applications, the Commission should consider such objections (and the challenged application) pursuant to the criteria proposed in the Notice: if the agreement (and the related application) would result in service that satisfy the Commission's set criteria, they should be approved without undue delay.

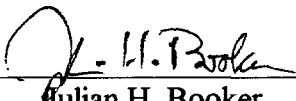
Once approved, any such interference agreement should be allowed to continue indefinitely. Negotiated agreements that are required to terminate at the end of a license term (or at some other point not agreed to by the parties) would decrease the benefits of such agreements substantially, as parties would be unwilling to risk the resources necessary to negotiate and implement such agreements if the agreement must be re-negotiated every few years or may end without their consent. Moreover, limiting the terms of such agreements would risk disruption of established broadcast service to certain audiences any time the agreements mandatorily expire or are required to be re-negotiated.

Instead, the terms of an approved agreement should be treated as additional conditions on the station's license for however long the parties deem appropriate. / Such an approach comports with the Commission's recognition that private agreements may promote efficient spectrum use. Only if one or more of the parties to an agreement wanted to change facilities in a manner that would materially increase or substantially re-locate predicted interference should the Commission be able to compel the parties to engage in the costly process of re-negotiating the agreement.

For the foregoing reasons, Delmarva applauds the Commission's proposal in the *Notice* to allow negotiated interference agreements between and among broadcast licensees.

Respectfully submitted,

**DELMARVA BROADCASTING
COMPANY**

By 
Julian H. Booker

Its President

December 4, 1998

/ To the extent that a negotiated agreement leads to modification of existing facilities, it would not be surprising if certain of the terms of the negotiated agreement do in fact become part of the any new authorization.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments were
hand delivered or mailed, postage prepaid, this 4th day of December, 1998 to:

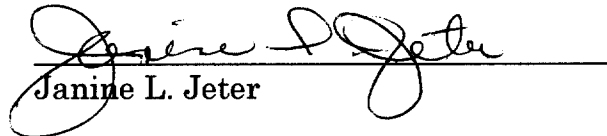
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